IN THE

Supreme Court of the United States

No. 595.

October Term, 1946.

JULIA A. PERRINE and MATILDA J. FELDMAN,
Petitioners,

v.

THE PENNROAD CORPORATION, a Corporation of the State of Delaware, and THE PENNSYLVANIA RAILROAD COMPANY, a Corporation of the Commonwelth of Pennsylvania.

BRIEF ON BEHALF OF RESPONDENT, THE PENNROAD CORPORATION, AGAINST PETITION FOR CERTIORARI.

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I. PRELIMINARY STATEMENT.

The petition for certiorari attempts to bring up for review the unanimous decision of the Supreme Court of Delaware affirming the decision of the Vice-Chancellor of Delaware, who, after almost three weeks of hearing testimony in open court, approved an agreement settling for $15,000,000.00, litigation which had been pending for over thirteen years, brought on behalf of The Pennroad Corporation, hereinafter called Pennroad, against the Pennsylvania Railroad Company hereinafter called Pennsylvania, and against the directors of Pennroad.

On October 18, 1932, Joseph W. Perrine (now dead) and Julia A. Perrine, one of the petitioners, hereinafter called Perrine, owner of 50 shares of stock of Pennroad, began a stockholders' suit against Pennroad, Pennsylvania, and individuals who were directors and voting trustees of stock of Pennroad, alleging that Pennsylvania and the directors

of Pennroad had used Pennroad's funds improperly for the benefit of Pennsylvania and to the injury of Pennroad. This suit hereinafter is called the Perrine suit.

The bill of complaint prayed among other forms of relief, for an accounting from Pennsylvania.

The suit was brought in the Court of Chancery of Delaware, because Pennroad was a Delaware corporation.

The suit was not based upon and did not mention any statute of the United States or of Delaware, or suggest that it involved any question concerning the Constitution of the United States or of Delaware.

After preliminary skirmishes, the suit came to issue. Some depositions were taken, but no further action was had in the Perrine suit until, in March, 1945, Pennroad presented its petition in that suit for approval of the settlement agreement which it had entered into with Pennsylvania subject to the approval of the Chancery Court of Delaware.

In the meantime, however, in 1939 and 1940, other stockholders of Pennroad named Overfield and Weigle, had begun actions similar to the Perrine suit, in the District Court for the Eastern District of Pennsylvania. These actions are hereinafter called the Overfield-Weigle cases.

The Overfield-Weigle cases came to trial early in 1941 in the District Court at Philadelphia, and resulted in a judgment in favor of Pennroad against Pennsylvania for $22,104,515.92. The actions were dismissed against the individual defendants, directors of Pennroad (42 F. Supp. 586, 48 F. Supp. 1008).

On appeal to the Circuit Court for the 3rd Circuit, the judgment in favor of the individual defendants was affirmed, and the judgment against Pennsylvania was reversed and the case remanded with directions to enter judgment in favor of Pennsylvania (146 F. 2d 889).

The opinion of the Circuit Court stated that the court endeavored to refrain carefully from passing any opinion on the merits of the plaintiffs' claims, and that the court

based its conclusion on the statute of limitations of Pennsylvania.

Judge Biggs dissented from the conclusions of the majority, and held that the Pennsylvania statute of limitations was not binding on the court. (This was before the decision in *Guaranty Trust Co. of New York v. York*, 326 U. S. 99, 65 S. Ct. 1464.) He considered the merits of the case, and was of the opinion that the plaintiffs' claims were justified, and that Pennroad was entitled to a much larger judgment against Pennsylvania than the District Court had entered.

The plaintiffs and Pennroad, which by this time had aligned itself definitely with its stockholders, planned to ask the Circuit Court for a rehearing.

Just at this stage, negotiations were begun for a settlement of all the litigation, and after careful consideration, the boards of directors of Pennroad and of Pennsylvania both approved an agreement, dated March 2, 1945, to settle the litigation for $15,000,000., Pennroad, however, stipulating that the agreement was subject to Court approval after notice to its stockholders.

When the mechanics of carrying out the settlement were examined, Pennsylvania proposed that the hearings on the settlement be conducted in connection with the Perrine suit, in which there had been *no adjudication,* instead of in the Overfield-Weigle cases which, as the record then showed, *had been adjudicated in favor of Pennsylvania.* Pennsylvania's reason was that this plan gave it a better chance of securing an allowance of the sum paid in settlement, as a deduction from income in its Federal tax return.

Pennroad concurred with this proposal, seeing a possible tax advantage also to it from this course of action (Record, pp. 132, 133).

Pennroad thereafter, on March 16, 1945, presented its petition to the Court of Chancery of Delaware, asking the court to fix the time for a hearing on approval of the settlement agreement.

Notice of the presentation of this petition was given to all parties and counsel who theretofore had participated in the Perrine suit.

Perrine through her counsel, Mr. Keenan, objected to the settlement, and Mr. Keenan asked the court for time to consider the form of the order to be entered by the Vice-Chancellor with respect to the hearings and the notice thereof.

The matter was adjourned, and at a hearing on March 19, 1945, an order was entered by the Vice-Chancellor in a form to which Mr. Keenan stated that he did not object (Record, p. 174), fixing a time for hearing about five weeks thereafter (April 23, 1945), and directing exactly what notice should be sent to Pennroad's stockholders and when it should be sent and what advertising should be made.

The order of the Vice-Chancellor was complied with by Pennroad, and the hearing began April 23, 1945. At that time, the court again postponed the hearing for two days to permit the filing of further objections to the settlement agreement.

The only objections filed were those of Perrine and of another lady who now entered the scene for the first time, Matilda J. Feldman, hereinafter called Feldman. Feldman stated that *she owned 7 shares of Pennroad stock,* and her attorney, Mr. Brady, stated that he represented other persons who owned 10,000 shares or so. (Pennroad's outstanding shares at this time were in excess of 6,000,000 shares, and there were over 100,000 stockholders of Pennroad). Mr. Brady did not state how recently these 10,000 shares had been acquired.

Perrine's original objections called only for proof of the good faith of Pennroad's directors.

At the hearing, however, Perrine filed a supplemental answer, alleging that if Pennroad's petition was granted over Perrine's objections, she would be deprived of an opportunity to have her case tried on its merits in violation of the due process provisions of the 14th Amendment.

But, at the opening of the hearing, Miss Perrine's counsel stated that he was satisfied that this point was erroneous—*and he asked, and obtained, leave to withdraw it* (Record, p. 90).

Feldman's objections were (1) to the form of the notice to stockholders as prescribed by the Vice-Chancellor, (2) that the directors of Pennroad who approved the settlement were mere tools of Pennsylvania, (3) that the Vice-Chancellor had not given enough time to stockholders to prepare for the hearing (this from a stockholder who hadn't lifted a finger from 1932 when the Perrine suit was commenced, until April, 1945), and (4) that the Delaware court had no jurisdiction to consider the settlement in view of Rule 23 (c) of the Federal Rules of Civil Procedure.

The Vice-Chancellor overruled these objections, and the hearings began April 25, 1945, and continued until May 11, 1945. The Vice-Chancellor heard 10 witnesses. The record of the hearings covers over 1,000 pages, without considering physical exhibits which included all briefs of all counsel in the Overfield-Weigle cases, which briefs alone were over 1,000 pages long.

After Pennroad's testimony was completed and at the end of the entire case, counsel for Perrine and for Feldman moved to dismiss the proceedings on the same grounds that they had urged at the beginning, except that they added two new ones: (1) That the notice to stockholders had not been approved by the Securities and Exchange Commission, and (2) that the court's attempt to entertain jurisdiction and its rulings in excluding evidence offered by the objectants denied them due process of law.

The Vice-Chancellor considered the matter for three months, and then handed down his decision approving the settlement agreement on the basis of the following findings of fact:

> (1) That the notice of the hearings "is in conformity with our [Delaware] practice and the objection must fail". (43 A. 2d 725.) (Record, p. 39.)

(2) "From the evidence, I conclude and find that in entering into the settlement the directors were free from disqualifying interests, and that they acted in good faith." (43 A. 2d 728.) (Record, p. 45.)

(3) "Good faith may, nevertheless, be impugned by a showing that the settlement is so unfair and grossly inadequate, from the standpoint of the corporation, as to impel the conclusion that it emanates from acts of bad faith, or a reckless indifference to the rights of others interested, rather than a reasonable exercise of business judgment." (43 A. 2d 728.) (Record, p. 45.)

(4) "The reasonable doubts and possibilities referred to [of getting a favorable judgment in the Perrine case] are not susceptible of precise reduction to a numerical ratio by any method of which I am aware. The court is not called upon to make an appraisal in the nature of an advisory opinion. Compare: In Re Midland United Co., 58 Fed. Supp. 667, 681. However, the long history of the litigation, the magnitude of the offer in settlement (particularly when compared with the amount of the only damages awarded by any judgment in favor of Pennroad on the basic claims), the testimony of the learned solicitors, Mr. Wolf and Senator Hastings,—all viewed in the factual setting of the record before me—furnish full warrant for the conclusion that the acceptance of the offer was within the reasonable exercise of business judgment and did not assail the good faith of the directors." (43 A. 2d 728.) (Record, p. 46.)

Perrine and Feldman filed a petition for reargument and rehearing, which was denied, and then appealed to the Supreme Court of Delaware, which after holding the matter under consideration for over five months, unanimously affirmed the Vice-Chancellor's decision (47 A. 2d 479) (Record, p. 60 and following).

The objectants filed a petition for rehearing in Supreme Court of Delaware, which was dismissed May 27, 1946.

Finally, on October 11, 1946, they filed their petition for a writ of certiorari, having secured an extension of time for that purpose.

No other stockholder of Pennroad has joined Perrine and Feldman (and the persons for whom Feldman claims to act) in their litigation in opposition to the settlement, and for over 1½ years the stockholders of Pennroad have been deprived of $15,000,000. The loss in interest alone to Pennroad exceeds $500,000.00.

II. OPINION OF SUPREME COURT OF DELAWARE.

The opinion is reported in 47 A. 2d, at 479 and following (Record, p. 60 and following).

III. QUESTIONS INVOLVED.

The questions involved are, what federal question is presented in

(1) The adequacy of the form of notice given by the order of a state court to stockholders of a corporation party to an agreement settling a stockholders' action pending in the state court?

(2) The orders of the Vice-Chancellor of the state court respecting the time for the hearing after the filing of notice?

(3) The assumption by the state court of Delaware of jurisdiction to consider and approve an agreement settling the case in the state court?

(4) The rejection of evidence by the Vice-Chancellor offered by the objectants to the settlement during the course of the hearing on the settlement agreement?

IV. REASONS FOR DENYING PETITION FOR CERTIORARI.

(1) The record presents no question of federal law.

(2) The record shows no error in the disposition of the case.

V. ARGUMENT.

(1) General Principles Governing Supreme Court Action on Appeal From State Courts.

That Sec. 237 (b), 28 U. S. C. A. Section 344 (b) of the Judicial code permits appeals to the Supreme Court of the United States from state courts only where a federal question is presented, is too well-known to require discussion.

In *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U. S. 206, 58 S. Ct. 528 (1938), the Court dismissed an appeal from a determination of the Supreme Court of Oklahoma denying a petition for rehearing in the nature of judicial review after a decision affirming an order of the Corporation Commission of the state fixing rates for telephone service. The Court said, per cur., at 530:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

In *Williams v. Kaiser*, 323 U. S. 471, 65 S. Ct. 363 (1945), the Court said, per Mr. Justice Douglas at 367:

> "It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. *Honeyman v. Hanan*, 300 U. S. 14, 18, 57 S. Ct. 350, 352; *Lynch v. New York*, 293 U. S. 52, 55 S. Ct. 16."

(2) As to the Notice to Stockholders.

With respect to the notice to the stockholders of Pennroad, petitioners say that the question is whether the notice was "inadequate, evasive and in violation of the general rules and regulations promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934".

In the first place, petitioner completely fails to show that the notice *was* in violation of any rules or regulations of the Securities Exchange Act of 1934.

Under the heading "Jurisdiction", petitioner quotes Rules X-14A-3 (a) and 5.

3 (a) refers expressly to proxies.

5 refers to solicitation "subject to Section 14 (a) of the Act".

14 (a) regulates the right of a person "to solicit or to permit the use of his name to solicit *any proxy or consent or authorization in respect to any security*", etc. (Italics ours.)

Pennroad didn't solicit or permit anyone to solicit *proxies or anything else,* and the Securities Exchange Act is entirely inapplicable to the situation

Evidently the Securities and Exchange Commission thought so too, for, as far as appears in the record, it never took the slightest notice of the matter.

Pennroad notified its stockholders by mail and by newspaper advertising that a hearing on its application for approval of the settlement agreement would be held at a certain time and place, and told them that they might appear and be heard; and the notice included exactly what the Vice-Chancellor of Delaware ordered it to contain. The Supreme Court of Delaware found that the notice was neither untrue nor misleading (Record, p. 69), and approved the Chancellor's dismissal of the objections thereto.

The holding that the form of the notice which the

court ordered sent to stockholders was "appropriate to serve its proper function" (Vice-Chancellor Pearson, 43 A. 2d, at 725) (Record, p. 39), and that it was in conformity with the practice of the Delaware courts, presents no federal question.

The cases cited by the petitioner at page 18 of the petition, have not the slightest relevancy to our case.

(3) As to Time Fixed for Hearing.

Not too definitely, petitioners allege that when on March 18, 1945 the Vice-Chancellor fixed April 23, 1945, as the time to begin the hearings there was a denial of due process: he should have fixed a later date.

The thorough examination of witnesses which petitioners made during the weeks of the hearings before the Vice-Chancellor is the best evidence that they had enough time to prepare their case.

The fixing of a time for hearing is in the discretion of every trial judge, and certainly no one can say that to fix five weeks is an abuse of discretion which amounts to a deprivation of property without due process of law.

In *Lisenba v. People of State of California*, 314 U. S. 219, 62 S. Ct. 280 (1941), the Court said, per Mr. Justice Roberts, at 286:

> "The insistence that the trial judge's refusal to grant a continuance, so that petitioner could take answering depositions, was a denial of due process goes even farther afield [than the complaint that certain testimony was admitted improperly]. . . . The Judge, in the exercise of his discretion, denied the motion. The Fourteenth Amendment gives this Court no mandate to review his action or inquire whether he abused his discretion in such a field."

(4) As to Assumption by State Court of Jurisdiction.

The contention of petitioner on this branch of the case seems to be that since the Overfield-Weigle cases were

still alive—although not too vigorously alive after the Circuit Court's opinion—the Court of Chancery of Delaware had no right in view of Rule 23 (c) of the Federal Rules of Civil Procedure, to hold hearings for the purpose of considering a settlement of the Delaware case, because the settlement contemplated also the termination (by inaction) of the Overfield-Weigle cases in the Federal Court.

The intimation is that somehow or other by presenting the matter to the Delaware court instead of to the federal court, there was a fraud perpetrated on the stockholders of Pennroad and a fraud perpetrated on the federal court.

As far as the stockholders are concerned, there is nothing in the record to indicate that they were prejudiced in the slightest degree by the fact that the hearings took place at Wilmington instead of at Philadelphia.

That no trick was contemplated is evident from the fact that Pennroad expected the hearings to take place in the federal court.

The first discussion of the matter occurred when Pennsylvania presented the draft of the settlement agreement, which called for proceedings in the state court.

The explanation given by Pennsylvania's counsel was a perfectly reasonable explanation. As matters then stood, the Circuit Court of Appeals had affirmed the District Court's judgment dismissing the action as to the individual defendants and had reversed the District Court's judgment against Pennsylvania. The Circuit Court had ordered judgment entered in favor of Pennsylvania. At that stage, therefore, and unless and until the Circuit Court granted a rehearing and revised its prior judgment, or until the Supreme Court granted a certiorari and reversed the judgment of the Circuit Court, Pennsylvania was exonerated and did not owe anything to Pennroad.

If in that situation Pennsylvania paid $15,000,000.00 *to settle a case which it had won,* Pennsylvania's counsel felt that there would be very little chance of having the Treasury Department treat the payment as a business ex-

pense, whereas, if the settlement took place in the forum of the Perrine suit, which at that stage *had not been adjudicated* for or against Pennsylvania, there was a much better chance of having the Treasury Department allow the settlement payment as a deduction from income.

If, however, Perrine or Feldman really felt that they were being prejudiced by having the hearings in the state court instead of in the federal court, they might have at least attempted to intervene in the Overfield-Weigle cases in the federal court. There was plenty of time to do this between March, 1945 and May, 1946 when the Supreme Court of Delaware handed down its opinion. Feldman never made any effort in that direction, and Perrine did not move to intervene in the Overfield-Weigle cases until the Circuit Court of Appeals in the Overfield-Weigle cases had rendered its final judgment and the time had elapsed for an appeal from the Circuit Court to the United States Supreme Court.

The Supreme Court may remember that Perrine was granted an extension of time to file a petition for certiorari in the Overfield-Weigle cases, and that the Supreme Court vacated that extension on September 4, 1946 when the Supreme Court discovered that the application for an extension had been made after the time had expired for an appeal from the Circuit Court to the Supreme Court.

Finally we submit that after participating for weeks in the trial of the case before the Court of Chancery at Wilmington, the petitioners are in no position to say that those proceedings were, so to speak, *in vacuo.*

As far as any fraud on the federal court is concerned, we call attention to the decision of the Circuit Court in ***Feldman v. Pennroad,*** 155 F. 2nd, 773, in which the court, per Maris, Circuit Judge, says, at 776, with respect to Rule 23 (c):

> "But this rule refers to action by the court in which the class suit is pending. It may well be that if the Overfield-Weigle suits had not been finally de-

> cided by this court but were still pending undetermined in the District Court for the Eastern District of Pennsylvania and an application had been made to that court for leave to dismiss them pursuant to a compromise settlement that court would have had authority to consider independently the wisdom and sufficiency of the settlement. The court below, however, was not in that position. No class suit was pending before it. On the contrary, as has been stated, its jurisdiction was invoked solely by reason of the diversity of citizenship of the parties and its duty, therefore, was to treat the plaintiff's cause of action exactly as the Delaware Court of Chancery would have treated it."

It is clear therefore that the federal court did not agree with the petitioner that the action of Pennroad in filing its petition in the Delaware court was, as to the federal court, an improper act.

The law with respect to the exercise of jurisdiction by state courts is that such exercise does not afford ground for review by the Supreme Court.

This rule is stated in *35 C. J. S., Section 189,* page 1281, as follows:

> "State laws and decisions have been followed and applied with respect to the jurisdiction, powers, and functions of the state courts."

(5) As to Rejection of Evidence.

The main argument of the objectors is that the refusal of the Vice-Chancellor to allow the objectors to introduce all the evidence produced in the Overfield-Weigle cases, constituted a denial of due process of law, because, they say, without the introduction of such evidence the Chancellor was not in a position to inquire into the merits of the settlement, and in fact, did not inquire into the merits of the settlement.

If it were material, we could point out that the Vice-Chancellor had before him in the testimony given at the hearing and in the evidence contained in the briefs of counsel and the opinions of the courts in the Overfield-Weigle cases, plenty of material upon which to reach a conclusion on the merits of the controversy between Pennroad and Pennsylvania.

We also could point out that both the Vice-Chancellor and the Supreme Court of Delaware in fact did consider the facts sufficiently to be able to decide that the settlement did not impel the conclusion that it emanated from acts of bad faith or reckless indifference "rather than a reasonable exercise of business judgment" per Vice-Chancellor Pearson, 43 A. 2nd, 721, at 728 (Record, p. 45).

However, even if we conceded that the Vice-Chancellor and the Supreme Court of Delaware made a mistake in failing to admit the evidence which the objectors offered, and to consider the merits of the case, this court has said on many occasions that such action on the part of the state court presented no federal question.

In *American Railway Express Company v. Kentucky,* 273 U. S. 269, 47 S. Ct. 353, (1927) the court said, per Mr. Justice McReynolds, at 355:

> "It is firmly established that a merely erroneous decision given by a State Court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law", citing many cases.

In *Jones v. Buffalo Creek Coal & Coke Company,* 245 U. S. 328, 38 S. Ct. 121 (1917) the court said, per Mr. Justice Brandeis:

> "It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for the plaintiff. But error of a trial judge in admitting evidence or entering judg-

ment after full hearing does not constitute a denial of due process of law. Central Land Company v. Laidley, 159 U. S. 103, 112, 16 S. Ct. 80".

In the *Laidley* case, the Court, per Mr. Justice Gray said,

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law, within the 14th amendment of the Constitution of the United States." (citing cases.)

In *Worcester County Trust Co. v. Riley,* 302 U. S. 292, 58 S. Ct. 185, (1937) the Court said, per Mr. Justice Stone, at 188:

> "In any case the Constitution of the United States does not guarantee that the decision of state courts shall be free from error, Central Land Co. v. Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; Tracy v. Ginzberg, 205, U. S. 170, 27 S. Ct. 461, 51 L. Ed. 755;"

In *Lisenba v People of State of California,* (*supra*) the Court said, per Mr. Justice Roberts, at 286:

> "We do not sit to review state court action in the admission of evidence."

Any other rule would lead to the absurd result that in every case tried in a state court in which any evidence was admitted over the objection of the losing party or any evidence was rejected when offered by the losing party, there would be a constitutional question involved with the consequent right to appeal to the federal courts.

The mere statement of such a contention answers it.

It certainly cannot be denied that in the present case the objectors had sufficient notice of the hearing before th Vice-Chancellor, that they had a full opportunity to be heard and that in fact they were heard at the hearing.

This is all that is required to constitute due process of law within the classical definition in *Pennoyer v. Neff*, 95 U. S. 714, at 733 (1878).

The only criticism the objectors make of the judicial proceedings is that the trial judge did not admit all the testimony which they offered.

No case ever has held and we respectfully submit that it is unlikely that any case ever will hold that such rejection of evidence, whether correct or erroneous, denies due process of law to the party who offered the evidence.

(6) Conclusion.

We respectfully ask that the petition for certiorari be denied.

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